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in the

Supreme Court
of the
United States

GLENN JONES and
WILLIE WATSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the Coast Guard Administrative search conducted on the "Geechee Boy II" was a pretext for an illegal search and seizure in violation of the Petitioners rights guaranteed by the fourth and fourteenth amendments of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on October 1, 1980.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at F.2d and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 1, 1980. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Petitioners were convicted of Conspiracy to Possess With Intent to Distribute Marijuana and Possession With Intent to Distribute Marijuana on June 18, 1979. An Appeal was taken to the Fifth Circuit Court of Appeals. Petitioner's convictions were affirmed by said Appellate court by decision rendered October 1, 1980. This Petition for Writ of Certiorari in the United States Supreme Court follows:

STATEMENT OF THE FACTS

The sole issue on appeal relates to a pre-trial motion to suppress contesting the legality of the Coast Guard search of the "Geechee Boy II". At the motion to suppress hearing held on July 19, 1978, James W. Decker of the United States Coast Guard testified that he boarded a vessel named the "Captain Odes II" at approximately 8:00 in the evening and found contraband on said vessel. Two other vessels were sighted within three miles of the "Captain Odes II", upon completing the boarding of the "Captain Odes II", Lieutenant Decker received orders to board the "Geechee Boy II". One of the main reasons for boarding the "Geechee Boy II" was because Lieutenant Decker had a suspicion that he would be able to find contraband thereupon. Even Harry Friedman of the Coast Guard Vessel "Cape York" admitted that the "routine safety inspection check" is used as a scam to allow a complete search of the subject vessel.

Based upon the foregoing facts, Petitioner's motion to suppress was denied. The testimony presented at trial was essentially the same as the testimony given at the hearing on the motion to suppress.

ARGUMENT

I

THE COAST GUARD ADMINISTRATIVE SEARCH CONDUCTED ON THE "GEECHEE BOY II" WAS A PRETEXT FOR AN ILLEGAL SEARCH AND SEIZURE, IN VIOLATION OF THE APPELLANTS RIGHTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Coast Guard Administrative search conducted on the "Geechee Boy II" was a pretext situation for an illegal search and seizure, and therefore, unconstitutional.

It is generally accepted that law enforcement officers may not utilize their legal authority in such a way as to create a pretext situation in order to justify a search. *United States v. Harris,* 321 F.2d 739 (6th Cir., 1963). Where an arrest is used only as a sham or front under which officers claim a right to make a search, the arrest, although independently valid, will be deemed illegal as well as the ensuing search. *Taglavore v. United States,* 291 F.2d 262 (9th Cir., 1961). That is to say, a valid ground for search as for example incident to arrest, cannot justify an exploratory search if the initial legal justification is being used solely as a pretext. *United States v. Jones,* 452 F.2d 884 (8th Cir., 1971); *Amador-Gonzalez v. United States,* 391 F.2d 308 (5th Cir. 1965). The test in determining whether or not a pretext exists is to examine the motivation and primary purpose of the

law enforcement officer. *Williams v. United States,* 418 F.2d 159 (9th Cir., 1969).

The Appellants would respectfully submit to this Court that the majority of case law on the issue of the illegality of pretextual searches has been a major issue in a sister circuit, the Fifth Circuit Court of Appeals and therefore, much of the following case law originates from that Circuit.

Pursuant to 14 U.S.C., Section 89(a), the Coast Guard may make inquiry, examinations, inspections, searches and seizures and arrests upon the high seas and waters under which the United States has jurisdiction, for the prevention and suppression of violations and laws of the United States. However, for such purposes, officers of the Coast Guard may go on board of any vessel subject to this jurisdiction to examine documents and papers. This particular section has been declared constitutional. *United States v. One 43 Ft. Sailing Vessel,* 538 F.2d 464 (5th Cir., 1976). However, a warrantless search of a vessel on the high seas ostensibly conducted as a safety or documentary inspection, when same is a pretext, it violates the Fourth Amendment if not predicated upon probable cause. *United States v. Warren,* 550 F.2d 219 (5th Cir., 1977) (reversed en banc. Sept. 13, 1978) F.2d. (5th Cir., 1978).

In the Warren case, the Court said specifically:

> "An American vessel, by venturing on the high seas, does not lose the protection of the Constitution from intrusions by its own Government. Consequently, Section 89(a) with

> its broad granting of power is subject to serious constitutional attack if implemented without caution and restraint . . . . what is proscribed, however, is extending for no reason, a search for safety purposes beyond that which is reasonably made to determine if the safety and documentary regulations have been followed. This Court is also casting doubt on the authority of the Coast Guard under this Statute to stop a vessel for any reason other than a safety or documentary purpose, absent a showing of probable cause that a crime has been or is being committed."

Despite the broad language of 89(a), there is only plenary power to stop a vessel and the validity of a subsequent search depends on the arising of probable cause. All evidence in the instant case was obtained as a result of the efforts of governmental officers whose only purpose in boarding Appellants' vessel was to look for obvious narcotics violations. Upon boarding Appellants' vessel, these officers began an extensive and high intrusive search of the vessel. The search and the inquiries directed to it were in no way connected with a safety and documentary inspection.

The Fifth Circuit Court of Appeals subsequent to its decision in *Warren,* realized that it may have been opening the proverbial Pandora's box by granting to the Coast Guard broad discretion. Therefore, the Fifth Circuit, in *United States v. Cadena,* 588 F.2d 100 (5th Cir., 1979), (On re-hearing) specifically stated that the mobility factor as referenced in *United States v. Terry,* 446 F.2d 219 (5th Cir., 1977) and *United States v.*

Carroll, 591 F.2d 1132 (5th Cir. 1979), is inapplicable in cases of this nature. The Court said:

> "Save for the ever increasing number of vacation vehicles and mobile homes, motor vehicles are not designed to be used as residences. The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo equipped van that every mariner or yachtsman expects aboard his vessel . . . . we also conclude that the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant. While we have no doubt that there were both sufficient probable cause and urgency in this case, our opinion does not imply that a warrantless search of a vessel at sea will ipso facto be judicially approved. The Supreme Court has declined as yet to carve out an exception to the Fourth Amendment warrant requirement for automobiles; we decline to create one for vessels."

To grant the Coast Guard officers the unfettered discretion apparently given under 89(a) has been denied to other law enforcement officers in similar situations. For example, the Supreme Court has said that such a grant of discretion to a Border Patrol officer on roving patrol would be unconstitutional. *United States v. Brigoni-Ponce,* 422 U.S. 873 (1975). The exigencies in the situation here are no different than those

confronting the border patrol in *Brigoni-Ponce, supra.* See also *Adams v. Williams,* 407 U.S. 143 (1973).

In *Adams,* the Court insisted that an investigative stop be based on a reasonable belief that the suspect has been or is about to be engaged in criminal activity. This reiterated the holding of *Terry v. Ohio,* 392 U.S. 14 (1968) where the Court required a frisk to be backed by reason of an articulable hunch that the subject is armed and dangerous.

At the very least, it is readily apparent that where less than probable cause or articulable standards existed, it is improper to randomly stop a vessel for the purpose of a routine safety and documentation check. This rationale has been recently borne out by the United States Supreme Court in *State of Delaware v. Prouse,* 59 L.Ed. 2d 660 (1979). In that case, the Court held that a police officer's random stopping of an automobile and the subsequent detention of the driver for a check of his driver's license and vehicle registration were violations of the Fourth Amendment as an unreasonable seizure. The facts in *Prouse,* briefly, were that a Delaware Police officer stopped and seized marijuana in plain view on the car floor after he had smelled the marijuana smoke walking toward the stopped vehicle. The officer stated that he felt he was entitled to stop the vehicle or any vehicle to perform a routine documentation check. The Court, in suppressing the evidence, stated:

> "The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constituted a seizure within the meaning of

those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief . . . the essential purpose of the proscriptions in the Fourth Amendment is the improper standard of reasonableness upon the exercise of discretion by government officials including law enforcement agents in order to safeguard the privacy and security of individuals against arbitrary invasion . . ."

It is axiomatic that one may freely substitute vessels for vehicles and arrive at the same determination. Simply speaking, the United States Supreme Court requires some standard prior to an intrusion unfavored by the Fourth Amendment. The Supreme Court summed it up based on the *Prouse* decision when it said:

"An individual operating or traveling in the automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation . . . were the individual subject to unfettered government intrusion, at the time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor, are they shorn of those interests when they step from the sidewalks into their automobiles . . . *Accordingly, we hold that except in those situations in which there is articulable and reasonable suspicion that a motorist is not*

licensed or that an automobile is not registered or that either the vehicle or occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."

Therefore, a random stop of an investigative nature as may have been asserted by the government in this case, is constitutionally impermissible.

Appellants do not dispute that less intrusive searches and seizures can be justified. However, even these have limits. See *Marshall v. Barlow's, Inc., infra.*

The Government agents here were from the outset, engaged in an affirmative investigation beyond the scope of a safety inspection, in which they sought out evidence of illegality by searching the boat. Therefore, it is clear that the seach of Appellants' vessel was unconstitutionally broad and predicated upon a pretext. Even if the United States Coast Guard were found to have the authority to stop a foreign vessel in territorial waters, their power to search does not extend beyond a mere safety inspection. A full scale search does not extend beyond a mere safety inspection. A full scale search, such as was conducted in this case required probable cause, which the Coast Guard did not have. *United States v. Warren* 550 F.2d 219 (5th Cir., 1977).

Given the fact that the arrest of Appellants, WATSON and JONES was illegal, it follows that any evidence obtained as a result of that arrest is tainted

and should be suppressed. *Wong Sun v. United States,* 371 U.S. 471 (1963). Thus, any statements made by Appellants after they were arrested, together with any items taken from their person cannot be legally used in evidence by the Government.

An administrative safety search authorized by existing statutory law and case law, without a warrant is invalid under the recent Supreme Court holding in *Marshall v. Barlow's Inc.,* 98 S.Ct. 1816 (1978), even if 14 USC, Section 89 were to apply allowing a safety or inspection check to be made of this vessel on the seas, it is unconstitutional and overbroad as written and applied, and thus, cannot be relied upon to render the search sub judice permissible, and the fruits of that search are inadmissible.

Appellants concede that the Fifth Circuit Court of Appeals has recently upheld the Government's reliance on, and constitutionality of Section 89 to an American vessel in similar situations in the past. See *United States v. Warren, supra.* See also *United States v. One 43 Ft. Sailing Vessel, supra;* and *United States v. Odom,* 526 F.2d 339 (5th Cir., 1976). Yet, all Fifth Circuit decisions to date with reference to this statute have been made without consideration of the United States Supreme Court decision in *Marshall v. Barlow's Inc.,* ___ US ___, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978).* Absent such consideration, the Fifth Circuit decisions

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*In Marshall, the U.S. Supreme Court struck down as unconstitutional that position of 84 STAT 1590, 29 USC, 657(a) 1970 which authorized warrantless, administrative, "safety" inspections of regulated business under the Occupational Safety and Health Act (OSHA).

appear to be constitutionally infirm, as suggested by Judge Fay in a footnote to his well reasoned dissent from the en banc opinion in *Warren, supra:*

> "It would be interesting to consider what effect the Supreme Court's recent opinion in *Marshall v. Barlow's* (citation omitted) has on propriety of even an administrative stopping for the limited purpose of a safety and documentary check. The Court in *Marshall* invalidated warrantless inspections of employment facilities which fall under the jurisdiction of the Occupational Safety and Health Act of 1970. It is possible that a warrantless stop limited in scope to safety violations is not justified under the Fourth Amendment? This particular point is beyond the scope of this dissent, but is nevertheless something the majority opinion ought to have discussed." at 6625, Footnote 3.

Present consideration of the constitutional propriety of Section 89 must include an examination of the Supreme Court's decision in *Marshall v. Barlow's Inc., supra.*

The Fourth Amendment Warrant Clause was a reaction on the part of the framers of the Constitution to the evils of the "general search". "The Fourth Amendment's comments grew in large measure out of the colonists' experience with Writs of Assistance . . . (that) granted sweeping power to customs agents of the King to search at large for smuggled goods." *Barlow's,* supra, at 1820, citing *United States v. Chadwick,* 433 U.S. 1 7-8, 97 S.Ct. 2476, 2481, 53 L.Ed. 2d 538 (1977).

It is significant that the wellspring of the Fourth Amendment was excessive, onerous customs searches for goods smuggled into the colonies. What better legislative history is there for the Appellants to rely upon? The statute herein challenged does exactly what the Fourth Amendment was designed to prevent. Coast Guard personnel are entirely unrestricted in their "regulatory safety" rummaging, exploratory, warrantless searches. Thus, any discussion of Section 89 must begin with a constitutional presumption of invalidity as being in direct contravention of the spirit and letter of the Fourth Amendment. The Supreme Court has long held that warrantless searches are generally unreasonable, and that the Court must "weight the public's interest against the Fourth Amendment interest of the individual", *United States v. Martinez-Fuente,* 482 U.S. 543 96 S.Ct. 3074 (1976), requiring the Government to justify an exemption from the Fourth Amendment requirements. See *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727 (1967); and *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737 (1967).

It is well settled warrantless searches are per se unreasonable, *Katz v. United States,* 389 U.S. 347, 99 S.Ct. 507 (1967), and the Government has the burden of justifying the same. Probable cause, alone, does not justify a warrantless search, there must also exist exigent circumstances to excuse the failing to obtain a warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 91 S.Ct. 2022 (1971). This is especially true where there is adequate time to obtain a search warrant. In *Michigan v. Tyler,*____ US ____, 98 S.Ct. 1942 (1978), the Supreme Court had the opportunity to apply the *Marshall* principles to the warrantless, administrative

search by State Fire officials of a warehouse at which a fire was suspected to have been caused by arson. The Court concluded that the fire officials' initial entry to extinguish the fire (which was not put at 4:00 a.m.) was certainly a valid warrantless entry necessitated by the exigencies of the circumstances, but the police and fire officials returning five hours later, without a search warrant, to investigate the cause of the blaze was prohibited by the Fourth Amendment. Speaking through Mr. Justice Stewart, the Court stated:

> "The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in a search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 US at 528, 87 S.Ct. at 1730, the basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against the arbitrary invasions of government officials. The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected periodic inspection. The privacy that is invalid may be sheltered by the walls of a warehouse or other commercial establishment, not open to the public. *See v. City of Seattle*, 387 US 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943; *Marshall v. Barlow's, Inc.*, ____ US ____ at ____, 98 S.Ct. 1816, 1819-1820, 55 L.Ed. 2d ____. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment." Id. at 1947.

In *Tyler, supra,* the State argued that the Defendant's right of privacy was foreclosed by virtue of their "abandonment of the premises" when they committed arson. Mr. Justice Stewarts' succinctly answered that contention:

> "For, it is of course impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used ex post facto to validate the introduction of evidence used to secure the same conviction." Id. at 1948

Justice Stewart further asserted:

> "Thus, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because of his purpose to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes like searches for evidence of crime, are encompassed by the Fourth Amendment. And, under that Amendment, one governing principle, justified by history and by current experience, has consistently been followed except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by

a valid search warrant. *Camara, supra,* at 528-529, 87 S.Ct. at 1731."

Finally, Mr. Justice Stewart observed:

> "Our decision have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant. *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (warrantless entry of house by police in hot pursuit of armed robber); *Kerr v. California,* 374 US 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (warrantless and unannounced entry of dwelling by police to prevent imminent destruction of evidence). Similarly in the regulatory field, our cases have recognized the importance of 'prompt inspections' even without a warrant . . . in emergency situations. *Camara, supra* 387 US at 539, 87 S.Ct. at 1736, citing *North American Cold Storage Co. v. City of Chicago,* 211 US 306, 29 S.Ct. 101, 53 L.Ed. 195 (seizure of unwholesome food); *Jacobsen v. Massachusetts,* 197 US 11, 25 S.Ct., 358, 49 L.Ed. 643 (compulsory smallpox vaccination); *Campagnie Francaise v. Board of Health,* 186 US 308, 22 S.Ct. 308, 22 S.Ct. 812, 46 L.Ed. 1209 (health quarantine)." Id. at 1951

The logical extension of this doctrine is what Appellants see here.

In *See* the Court spoke of the right to go about one's business free from unreasonable "official warrantless

searches". Expounding on this, the *Marshall v. Barlow's Inc.* Court observed:

> "If the Government intrudes on a persons' property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal law or breaches of other statutory or regulatory standards. It therefore appears that unless some recognized exception to the current requirement applies, *See v. City of Seattle, supra,* would require a warrant to conduct the inspection sought in this case." 98 S.Ct. at 1820.

The Government's reliance on Section 89 in cases like the one sub judice is ostensibly based on the "need to conduct safety and administrative document checks." The Coast Guard here had no other reason to board. There was no probable cause to believe that any other laws of the United States were being violated, or even that safety and registration violations were taking place. The essence of reasonableness of Section 89 must, therefore, turn on balancing the competing interests of the Government and individual with reference to the burden of requiring a warrant. As the *Marshall* Court stated:

> "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." 98 S.Ct. at 1825

Sub judice, it is obvious that Section 89 (unlike even the invalidated OSHA regulations in Marshall) contains no privacy guarantees. The Coast Guard's

authority is unlimited, its discretion unbridled, and the potentialities for general non-consensual warrantless rummaging searches of private property are limitless. Yet, the Government argues this situation should continue simply to allow safety and paper documentation checks like the one in this case. The imbalance of priorities requires invalidation of the statute, especially when the "safety" checks are clearly means to effectuate warrantless searches for contraband.

The fact of the matter is that a warrant requirement for this type of search would not impose an extra burden on the procedure which is so great as to render the regulation any less effective. Unlike the OSHA regulatory searches, a warrant requirement would not at all hamper the effectiveness of Section 89 searches. First, many, if not most vessels would voluntarily consent. But, even where consent is withheld, any delay in obtaining a warrant would have no detrimental effect, unlike the Barlow's OSHA searches. Major safety violations cannot be corrected at sea. Improper documents can hardly be amended or improper registration papers revised at sea. Nor, is there any danger of the contraband disappearing, for the Coast Guard would be standing by, keeping the vessel under "custodial surveillance" while the search warrant upon oral testimony was sought, by telephone or other appropriate means such as radio-telephonic or ship to shore communications. See Rule 41(c)(2)(A-C), Federal Rules of Criminal Procedure. Of course, if the pre-boarding oral application for search warrant established probable cause, then the United States Magistrate would orally authorize the search warrant and the search could then lawfully be executed. If, on the other

hand, the Coast Guard while orally applying for the search warrant, observed the vessel in distress, i.e.; sinking (naturally or otherwise), or determined a concerted effort was being made to jettison the contraband, then exigent circumstances might well exist which would obviate the need for a search warrant. The Coast Guard would hardly be handicapped by the need for radio transmission requesting a warrant, especially given the lapse in time between the actual sighting and the boarding of the vessel, as here. The burden on the Government of obtaining a search warrant is relatively minor when weighed against the suspects' rights of privacy. Moreover, the Fourth Amendment concerns are enormous:

> "Nor, do we agree that the incremental protections afforded the employer's (owner's) privacy justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the constitution, is authorized by statute, and is pursuant to an administrative plan containing the specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not to proceed. These are important functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for

compliance with regulatory statutes." *Marshall, supra,* 98 S.Ct. 1825-26.

If indeed, the Coast Guard actions pursuant to and in reliance upon Section 89 were not pretextual or in fact mere ploys to gain access to a vessel for a general search of it, then the regulatory "documents and safety" check is unhampered by the warrant requirement. If the invocation of Section 89 is a convenient pretext to make general exploratory searches in hopes of detecting smuggling, the reason for invalidating the statute or severely restricting its application on constitutional grounds are more compelling still.

The Marshall Court, supra, was not unmindful of the possible effects of that decision on other regulatory search statutes. While limiting the hold to OSHA regulations only, pursuant to the Court's tradition of narrow constitutional adjudication, the United States Supreme Court felt compelled to state that it did not "retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes". 98 S.Ct. at 1825. Thus, it would appear that Section 89, like the OSHA statute, is constitutionally infirm especially because it creates a greater objectionable infringement on Fourth Amendment rights than did the OSHA statute; thus Appellants contend the Supreme Court would hardly hestitate to declare it unconstitutional if not as written, certainly as applied.

It is important to note that only one Federal Court has to this point opined on the applicability on the *Marshall v. Barlow's* decision, to Coast Guard safety inspections. The Honorable Justice Schwartzer, writing

the opinion in *United States v. Piner,* (N.D., California, June 21, 1978) 452 Fed. Supp. 1335, applied the rule enunciated to Section 89 and thereupon stated:

> "Any warrantless on board inspection remains subject to scrutiny respecting its reasonableness considering; (1) the degree of intrusion in relationship to the subject matter charged, and (2) the degree of discretion exercised by the inspective official in determining the time, place and subject of the inspection."

Justice Schwartzer upheld his prior reasoning in *Piner,* supra, granting the Appellants Motion to Suppress, predicating same upon the fact that the search and stopping was arbitrary random and unjustified because according to the Coast Guard Captain, it was a slow night and the Coast Guard wanted to board at least one boat.

The Court was careful to point out in a footnote to the opinion that nothing in the order was to be taken as affecting the Coast Guard's authority to board vessels for the purpose of constituting a warrantless safety inspection, upon observation of reasonable suspicion of unsafe conditions.

Since the search sub judice was made pursuant to an illegal procedure, all evidence, both physical and testimonial, doctrines of *Wong Sun v. United States,* 271 US 471, 83 S.Ct. 407 (1963); its progeny, and the exclusionary rule of *Mapp v. Ohio,* 367 US 643, 81 S.Ct. 1684 (1961).

Based on the foregoing law and cases cited herein, it is respectfully submitted that this Court suppress the evidence against Appellants, GLENN JONES and WILLIE WATSON.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellants Brief was furnished by U.S. mail to the Office of the United States Attorney, 155 South Miami Avenue, Miami, Florida, this 24 day of November, 1980.

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Appendix

Opinion of the Fifth Circuit Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-5166
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GLENN JONES AND WILLIE WATSON,
Defendants-Appellants.

Appeal from the District Court for the Southern District of Florida

(OCTOBER 1, 1980)

Before GODBOLD, KRAVITCH and HATCHETT, Circuit Judges. PER CURIAM:

Appellants, Glenn Jones and Willie Watson, were convicted after a non-jury trial for conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §846, and for possessing with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. We affirm their convictions.

During a routine administrative and safety investigation of another vessel, the Coast Guard cutter CAPE YORK observed appellants' shrimp boat, the GEECHEE BOY II. Aware that she was under Coast Guard observation, the GEECHEE BOY II, who had not been shrimping, weighed anchor and headed into a nearby shrimp fleet. The CAPE YORK radioed this information to Coast Guard headquarters in Key West and received instructions to locate the GEECHEE BOY II. After locating the vessel some three hours later, the CAPE YORK sent a boarding party to conduct an administrative and safety investigation. The GEECHEE BOY II was always within the twelve-mile customs waters limit. The boarding party detected the odor of marijuana when they boarded. The vessel's documentation was not in order. A safety inspection revealed bales of marijuana in the galley; further inspection revealed bales of marijuana in the afterhold, the engine room, and the wheelhouse. The boarding party then arrested appellants and advised them of their rights.

On this appeal, appellants contend that the Coast Guard's administrative search was a pretext for an unconstitutional contraband search.

Appellants' contention has no merit. Coast Guard administrative and safety inspections conducted pursuant to 14 U.S.C. §89(a) are constitutionally permissable. *United States v. Hicks,* No. 79-5431 (5th Cir. Aug. 13, 1980); *United States v. Gourlay,* No. 79-5203 (5th Cir. Aug. 8, 1980); *United States v. Williams,* 617 F.2d 1063 (5th Cir. 1980) (en banc).

Here, the facts argue against the assertion that the Coast Guard's §89(a) inspection was a mere pretext for an opportunity to conduct a full search. This court rejected a similar argument in *United States v. Baker,* 609 F.2d 134 (5th Cir. 1980).

Further, contraband seen in plain view during a §89(a) inspection may be seized and provides probable cause for a more extensive search of the vessel. *United States v. Hillstrom,* 533 F.2d 209 (5th Cir. 1976), *cert. denied* 429 U.S. 1038 (1977). The odor of marijuana also establishes probable cause for a search. *United States v. Erwin,* 602 F.2d 1183 (5th Cir. 1979); *cert. denied* 100 S.Ct. 1040 (1980).

Accordingly, since the search was not a pretext and since probable cause existed, we affirm.

AFFIRMED

No. 80-911

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN JONES AND WILLIE WATSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-911

GLENN JONES AND WILLIE WATSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the boarding and search of their vessel by the Coast Guard violated the Fourth Amendment.

1. Following a non-jury trial on stipulated facts in the United States District Court for the Southern District of Florida, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846.[1] They were sentenced to concurrent terms of three years' imprisonment on each count, and to concurrent special parole terms of two years. The court of appeals affirmed (Pet. App. 1-3).

Prior to trial, petitioners moved to suppress evidence seized by Coast Guard officers following the boarding of petitioners' vessel off the Florida coast. The district court

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[1]Petitioners were acquitted of attempting to import marijuana (21 U.S.C. 952).

denied the motion. The evidence showed that on July 19, 1978, at approximately 8:00 p.m., Coast Guard officers from the cutter CAPE YORK were preparing to conduct a routine administrative and safety inspection of an American shrimping vessel, the CAPTAIN OTIS II. At about the same time, fellow officers observed two other shrimp trawlers, the MISS ELENA and the GEECHEE BOY II, approximately three miles to the west (H. Tr. 10-11, 31-32.)[2] As soon as the boarding party came on board the CAPTAIN OTIS II the two other trawlers, which had been at anchor and did not have their shrimp nets out, got under way and headed into a nearby shrimp fleet (H. Tr. 12-13). Coast Guardsmen aboard the CAPE YORK radioed this information to Coast Guard headquarters in Key West, Florida, and received instructions to locate the other two shrimp boats (H. Tr. 13-14). Nearly three hours later, the crew of the CAPE YORK located the GEECHEE BOY II within the 12-mile territorial limit, with its shrimp nets in the water; a Coast Guard boarding party was sent to conduct an administrative and safety inspection of the GEECHEE BOY II to insure compliance with federal laws (H. Tr. 16-18, 27). Upon boarding the vessel, which was manned by petitioners, the boarding party detected the odor of marijuana (H. Tr. 37-38, 42, 45-46). A check of the vessel's documentation papers revealed that those papers were not in order (H. Tr. 37-38). Moreover, while checking the safety equipment, two members of the boarding party observed bales of marijuana in the vessel's galley (H. Tr. 46-47). Further inspection revealed bales of marijuana in the hold, the engine room, and the wheelhouse; in all 57,240 pounds of marijuana were seized (H. Tr. 39, 41, 43; Tr. 2).

2. Petitioners contend that the boarding of the GEECHEE BOY II to conduct a documentation and safety

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[2]"H. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript.

inspection violated their Fourth Amendment rights because it was unsupported by probable cause or reasonable suspicion that the vessel was being operated in violation of United States laws. They argue that the Coast Guard sought to circumvent the requirements of the Fourth Amendment by using the pretext of a document and safety check to disguise their actual motivation, which allegedly was to uncover evidence of a drug smuggling scheme. The court of appeals properly rejected these contentions.

The evidence showed that the purpose of the Coast Guard patrol was to enforce all United States laws, including safety and documentation requirements, not only those laws relating to drug smuggling. This Court has recently declined, on several occasions, to review similar claims that the Fourth Amendment was violated by warrantless and suspicionless boardings of vessels at sea by Coast Guard officers conducting safety and documentation inspections pursuant to 14 U.S.C. 89(a). See *Erwin* v. *United States*, cert. denied, 444 U.S. 1071 (1980); *Warren* v. *United States*, cert. denied, No. 79-6217 (May 19, 1980); *Harper* v. *United States*, cert. denied, No. 79-1863 (Oct. 6, 1980).

There is even less reason to grant review in the present case. This is not a situation akin to that in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), where police officers made random stops of motor vehicles for license and registration checks. In *Prouse* the Court held that stopping an automobile and detaining the driver for a license and registration check is unreasonable under the Fourth Amendment absent articulable and reasonable suspicion that the motorist is unlicensed, the vehicle is unregistered, or that the vehicle or its driver are otherwise subject to investigation for violation of law. 440 U.S. at 663. Here, the Coast Guard officers boarded the GEECHEE BOY II only after their suspicions were aroused by their observations of petitioners' vessel. The GEECHEE BOY II had been at anchor with its shrimp

nets up prior to the boarding of the CAPTAIN OTIS II, another shrimp trawler that was in the area. As the boarding crew boarded the CAPTAIN OTIS II, petitioners' vessel immediately weighed anchor, lowered its shrimp nets and joined a nearby shrimp fleet. In light of this behavior, it was not unreasonable for the Coast Guard officers to suspect that the persons on board the GEECHEE BOY II were seeking to avoid detection for violation of documentation or other United States laws. See, *e.g.*, *United States* v. *Allen*, No. 79-1059 (9th Cir. Nov. 5, 1980), slip op. 890; *United States* v. *Demanett*, 629 F. 2d 862, 868 (3d Cir. 1980), petition for cert. pending, No. 80-553; *United States* v. *Rubies*, 612 F. 2d 397, 400-401, 403-404 (9th Cir. 1979), cert. denied, No. 79-5954 (May 12, 1980). Thus, assuming arguendo that the standards established in *Prouse* are applicable to Coast Guard boardings of American vessels at sea, they were satisfied here.[3]

In any event, even if the observations of petitioners' vessel did not give rise to reasonable suspicion to justify a stop under *Prouse*, we submit that the holding of *Prouse* should not be applied uncritically to boardings of vessels at sea. In light of the important governmental interests in enforcing the numerous laws applicable to vessels on the high seas (including documentation and licensing requirements, marine safety and navigation laws, and fisheries conservation and management laws), the practical difficulties involved in law

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[3]Because the boarding here was justified by reasonable suspicion, this case does not conflict with *United States* v. *Piner*, 608 F. 2d 358, 361 (9th Cir. 1979), which held that because of the heightened "subjective intrusion," the Fourth Amendment is violated by random boardings after dark. The case is also distinguishable from *Piner* because the stopped vessel here was a shrimp trawler, whereas *Piner* involved the stopping of a pleasure craft. Because of the comprehensive federal regulation of fishing and trading vessels (see *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 272 (1977)), persons aboard such vessels can have no reasonable expectation of complete freedom from governmental intrusion.

enforcement at sea, and the reduced expectations of privacy of those on board American flag vessels—particularly fishing or trading vessels—because of the pervasive nature and long history of maritime regulation, several courts of appeals have correctly held that the limited intrusion upon legitimate privacy interests occasioned by boardings conducted under the authority of 14 U.S.C. 89(a) is not unreasonable within the meaning of the Fourth Amendment. See *United States* v. *Arra*, 630 F. 2d 836, 840-842 (1st Cir. 1980); *United States* v. *Hilton*, 619 F. 2d 127, 131-133 (1st Cir. 1980), cert. denied, No. 79-1732 (Oct. 6, 1980); *United States* v. *Williams*, 617 F. 2d 1063, 1079-1084 (5th Cir. 1980).

Under Section 89(a), the Coast Guard officers were empowered to board the GEECHEE BOY II for the proper purpose of conducting a documentation and safety inspection. The strong odor of marijuana that the officers detected immediately upon boarding, and the bales of marijuana that came into plain view in the course of the limited safety check, provided probable cause to conduct a thorough, warrantless search of the vessel. See *United States* v. *Alfrey*, 620 F. 2d 551, 555 (5th Cir. 1980), cert. denied, No. 80-5158 (Oct. 20, 1980); *United States* v. *Erwin*, 602 F. 2d 1183, 1184 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); *United States* v. *Whitaker*, 592 F. 2d 826, 829 (5th Cir.), cert. denied, 444 U.S. 950 (1979).

There is no substance to petitioners' claim that the boarding of the GEECHEE BOY II for a documentation and safety check was merely a pretext to search for contraband. First, the court of appeals found (Pet. App. 3) that "the facts argue against the assertion that the Coast Guard's §89(a) inspection was a mere pretext for an opportunity to conduct a full search." See H. Tr. 25-27. But even if one of the officers' purposes in boarding the vessel was to search for contraband, their state of mind would not invalidate an otherwise proper search. See *United States* v. *Arra*,

supra, 630 F. 2d at 845-846; *United States* v. *Demanett*, *supra*, 629 F. 2d at 869. As the Court made clear in *Scott* v. *United States*, 436 U.S. 128, 137 (1978), the existence of an alleged Fourth Amendment violation turns on an objective assessment of the officer's actions in view of all the pertinent circumstances, without regard to his underlying intent or motivation in taking those actions.[4] See also *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, the Coast Guard officers properly boarded the vessel to conduct a documentation and safety inspection pursuant to 14 U.S.C. 89(a); the officers' actions once on board the vessel were consistent with that purpose and were reasonable under the Fourth Amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

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[4]Petitioners' argument would lead to the absurd result that officers with reason to suspect criminal activity could not conduct the very same limited inspection that is proper in the absence of any suspicion at all. See *United States* v. *Arra*, *supra*, 630 F. 2d at 846.